

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JUN 21 2011
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

AMERICAN TRADITION INSTITUTE)
2020 Pennsylvania Avenue, N.W.)
Number 186)
Washington, D.C. 20006)

Plaintiff,)

v.)

NATIONAL AERONAUTICS AND)
SPACE ADMINISTRATION,)
Headquarters)
Washington, DC 20546-0001)

Defendant.)

Case: 1:11-cv-01144
Assigned To : Huvelle, Ellen S.
Assign. Date : 6/21/2011
Description: FOIA/Privacy Act

COMPLAINT AND PRAYER FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff AMERICAN TRADITION INSTITUTE ("ATI") for its complaint against Defendant NATIONAL AERONAUTICS AND SPACE ADMINISTRATION ("NASA") alleges on knowledge as to Plaintiff, and on information and belief as to all other matters, as follows:
2. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to compel production of certain NASA records relating to agency and agency employee compliance with their statutory and regulatory ethics and disclosure obligations. In a FOIA request initiated in January 2011, ATI sought documents concerning the integrity of internal NASA compliance with and oversight of ethics and disclosure laws and specifically involving the conduct of one NASA scientist. For over four months NASA has refused to comply with a specific request for records, obstructing

the FOIA process. The public needs transparency from its government about climate science and about agency performance of its statutory duties, particularly involving ethics, with debate about transparency, climate-related science and related policies capturing sustained national attention. Yet NASA has repeatedly and unlawfully refused to produce the requested materials. NASA is accountable to the taxpayers and to the public. It should not be free to disregard its FOIA obligations. Plaintiff has exhausted its administrative remedies and has no recourse but this lawsuit.

PARTIES

3. Plaintiff ATI is a public policy research and educational foundation with a physical presence in Washington, D.C., dedicated to advancing responsible, economically sustainable environmental policy. ATI's programs include research, investigative journalism, and its Environmental Law Center, which has a transparency initiative seeking records relating to environmental and particularly climate change science and policy.

4. Defendant NASA is a federal agency whose stated mission is to pioneer the future in space exploration, scientific discovery, and aeronautics research. NASA's Goddard Institute of Space Studies ("GISS") is a division of NASA based in New York City and styles itself as a "leading center of atmospheric modeling and of climate change."

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) because this action is brought in the District of Columbia and 28 U.S.C. § 1331 because the resolution of disputes under FOIA presents a federal question.

6. Venue is proper in this Court under 28 U.S.C. § 1391(b) because Defendant

NASA's principal place of business is in the District of Columbia.

FACTUAL BACKGROUND

7. This lawsuit seeks to compel NASA to respond fully and completely to a FOIA request dated January 19, 2011. The request sought information relating to the personnel or ethics file(s) of NASA employee Dr. James E. Hansen, specifically pertaining to the Ethics in Government Act, Hansen's outside employment and other activities, and his efforts to obtain the required waivers for such activities, which records reveal and otherwise reflect upon whether he and NASA have complied with certain and respective financial disclosure, reporting and other ethics-related obligations.

8. NASA has refused to produce certain requested information and to provide entire or redacted versions of a specific NASA personnel form. NASA here continues its documented practice of converting the FOIA process—which is intended to provide citizens with prompt and complete disclosure—into a protracted battle in which requests are denied on plainly incorrect, inapplicable or otherwise unsupportable grounds. In the instant matter Plaintiff's request seeks to shed light on agency performance of its statutory duties, which NASA improperly recasts in order to seek shelter in a "more stringent standard for 'agency wrongdoer claims'", similarly dismisses as "mere unsupported allegations" internal records provided by Plaintiff which represent prima facie evidence of NASA not fulfilling its statutory and regulatory obligations, and refuses without explanation to consider redacting records to withhold potentially sensitive information while providing transparency consistent with FOIA's intent.

Relevant Ethics Restrictions and Disclosure Requirements
Applicable to NASA Employees

9. Federal agencies and employees are covered by various ethics-related obligations adopted by both statute and regulation, including those that prohibit certain outside employment or activities or use of public office and assets, that permit certain outside employment or activities so long as application is made and granted in advance, and that require disclosure of certain outside employment or activities, gifts or income.

10. It is a statutory function of each agency to impose implementing regulations for and ensure compliance with each of these restrictions and requirements. (See e.g., the Ethics in Government Act of 1978, 5 U.S.C. App §101 *et seq.*, and 5 C.F.R. § 2635).

11. About these obligations the Office of Government Ethics writes that an employee may not be paid for outside teaching, speaking and writing if the activity relates to his official duties, unless this amounts to "teaching a course at an accredited educational institution." (citing 5 C.F.R. §§ 2635.801-809; *United States v. National Treasury Employees Union*, 115 S. Ct. 1003 (1995); OGE DAEOgram DO-95-011 (March 3, 1995))

12. OGE similarly writes that "Employees may not use their official title or position (*except as part of a biography or for identification as the author of an article with an appropriate disclaimer*) to promote a book, seminar, course, program or similar undertaking." (*emphases added*)

13. 5 C.F.R. § 2635 articulates restrictions on federal employees regarding gifts from outside sources, on paid and unpaid service as an expert witness, on paid and unpaid teaching, speaking, and writing, on the use of public office for private gain, and on the use of government employment, facilities and employees.

14. 5 C.F.R. § 2635 also requires, *inter alia*, that for the purpose of administering its ethics program an agency shall, by supplemental regulation, require employees to obtain prior approval before engaging in specific types of outside activities, including outside employment. (§ 2635.803 citing 57 FR 35042, Aug. 7, 1992, as amended at 59 FR 4780, Feb. 2, 1994; 60 FR 6391, Feb. 2, 1995; 60 FR 66858, Dec. 27, 1995; 61 FR 40951, Aug. 7, 1996; 62 FR 48748, Sept. 17, 1997).

15. Toward fulfilling the latter obligation NASA regulations require, *inter alia*, that employees must obtain approval before engaging in specified outside employment activities. These include any form of compensated or uncompensated non-Federal employment or business relationship involving the provision of personal services by the employee, including but not limited to personal services as an employee, agent, consultant, contractor, teacher, or speaker. This also includes writing under an arrangement with another person for production or publication of the written product. Enumerated exemptions from this requirement do not apply when, *inter alia*, such activities involve the provision of professional services or advice or are for compensation other than reimbursement of expenses. 5 C.F.R. § 6901.103, Supplemental Standards of Ethical Conduct for Employees of the National Aeronautics and Space Administration.

16. These requests for permission must be in advance, in writing and must include, *inter alia*, (i) the federal employee's name and occupational title; (ii) a full description of the specific duties or services to be performed in this outside employment; (iii) the outside employer's name and address; (iv) the estimated total time that will be devoted to the activity and, if the employment is on a continuing basis, the estimated number of hours per year, or else the anticipated beginning and ending date; (v) a statement as to

whether the work can be performed entirely outside of the employee's regular duty hours and, if not, the estimated number of hours of absence from work that will be required; (vi) the amount of compensation, if any, to be received; and (vii) a statement that the employee currently has no official duties involving a matter that affects the outside employer and will disqualify from future participation in matters that could directly affect the outside employer.

17. NASA's GISS implements this application-and-waiver requirement of disclosure and permission through GSFC Form 17-60, "Permission to engage in outside employment or activity". Consistent with regulation these one-page forms require disclosure only of a "description of outside employment or activity", an assertion of the "name of prospective employer/affiliate", "reimbursement expected", "estimated total time per week to be devoted to outside employment or other activity", and an attestation whether the work will be performed "beyond normal duty hours".

18. These forms, which Plaintiff seeks for James E. Hansen, are "personnel" records, whose existence or non-existence in an individual case sheds light on whether an agency and an agency employee fulfill certain statutory and regulatory ethics obligations.

19. Under the Ethics in Government Act of 1978, 5 USC App §101, "Persons required to file", as a condition of holding certain taxpayer funded positions of public trust and responsibility, numerous federal employees including Article III federal judges, the president, members of Congress and a small universe of senior taxpayer servants, including Hansen, must annually submit detailed financial information on an employee's financial holdings and outside income in the form of the multi-page Form SF 278, "Executive Branch PUBLIC FINANCIAL DISCLOSURE REPORT".

20. This highly specific disclosure is available upon request to the public, on the grounds that the public must have confidence in the unbiased fulfillment of important responsibilities and trust, and otherwise the proper use of taxpayer time and resources.

21. Employees at a level requiring disclosure under Form SF 278 (changed to Form OGE 278 in December 2010) cede a certain level of privacy afforded the private citizen and lower-ranking federal employees, as a statutory condition of holding their position.

22. Ensuring compliance with ethics and disclosure laws generally, and with Forms SF 278 and 17-60 and their related requirements, are all statutory functions of NASA.

23. Unlike the detailed Form SF 278 the sole potentially personal financial information of consequence required to be provided on the one-page Form 17-60 is the expected compensation and outside employer, which already must be disclosed on a senior employee's SF 278 when the compensation exceeds \$5,000.

24. In part due to this overlap, and the requirement of Form 17-60 as a condition precedent to activities which according to the public record Hansen has broadly engaged in, the existence or non-existence of Form 17-60 applications for these known outside activities reveals whether statutory duties are being implemented. Its existence or non-existence is itself therefore of significant public interest.

25. Release of Form 17-60 with sufficient detail to identify the employee, the outside employment or activity, relevant period, and attestation whether it will be performed "beyond normal duty hours" allows the public to compare e.g., an employee's SF 278 filing and/or the public record and sheds light on whether an agency is fulfilling its statutory obligation to comply and ensure compliance with applicable ethics law and regulation regarding permission and disclosure.

26. Form 17-60 also thereby sheds light on an agency's compliance with its duty to implement and enforce regulation against prohibited activities identified in 5 C.F.R. 2635. These are, *inter alia* with certain exclusions, a federal employee receiving compensation from any source other than the Government for teaching, speaking or writing that relates to the employee's official duties. Per 5 C.F.R. § 2635.807, *Teaching, speaking and writing*, "Teaching, speaking or writing relates to the employee's official duties if: (A) The activity is undertaken as part of the employee's official duties; (B) The circumstances indicate that the invitation to engage in the activity was extended to the employee primarily because of his official position rather than his expertise on the particular subject matter; (C) The invitation to engage in the activity or the offer of compensation for the activity was extended to the employee, directly or indirectly, by a person who has interests that may be affected substantially by performance or nonperformance of the employee's official duties;..."

27. 5 C.F.R. 2635 also, *inter alia*, prohibits an employee from using public office for his private gain. Specific prohibitions apply to this general standard, without being exclusive or limiting the application of that section, and include "(b) *Appearance of governmental sanction*. Except as otherwise provided in this part, an employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that could reasonably be construed to imply that his agency or the Government sanctions or endorses his personal activities or those of another. When teaching, speaking, or writing in a personal capacity, he may refer to his official title or position only as permitted by §2635.807(b)..." (§ 2635.702 Use of public office for private gain). That latter provision permits the employee's official position to be "one of

several biographical details when such information is given to identify him in connection with his teaching, speaking or writing, provided that it is given no more prominence than other significant biographical details.”

28. 5 C.F.R. 2635 also, *inter alia*, prohibits federal employees from using government property, or allowing its use, for other than authorized purposes. For purposes of this section, “government property” includes, *inter alia*, government-purchases rights or interests such as the services of contractor personnel, office supplies, telephone and other telecommunications equipment and services, the government mails, automated data processing capabilities, printing and reproduction facilities, and government records. “Authorized purposes” are those purposes for which government property is made available to members of the public or those purposes authorized in accordance with law or regulation.

29. 5 C.F.R. 2635 also, *inter alia*, requires a federal employee to use official time in an honest effort to perform official duties, and prohibits an employee from encouraging, directing, coercing, or requesting a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation. § 2635.705 Use of official time.

30. The above-cited statutory and regulatory provisions apply to NASA and James E. Hansen, a career employee of the federal government, over all relevant periods addressed in this proceeding.

31. NASA is aware of these provisions.

32. NASA has an obligation to implement and enforce these requirements.

33. Form 17-60 sheds light on NASA's fulfillment of its obligations to ensure compliance with 5 C.F.R. 2635.

**Plaintiff's FOIA Request Seeking Certain
Specified Ethics Disclosure and Disciplinary Records**

34. Under FOIA, the public interest to be considered is "the kind of public interest for which Congress enacted the FOIA," one which "sheds light on an agency's performance of its statutory duties." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773, 775 (1989).

35. Compliance with or non-fulfillment of its statutory and regulatory ethics obligations by agencies and their employees is a matter of public interest.

36. Consequently, on January 19, 2011, Plaintiff served a FOIA Request on NASA seeking documents and information relating to James E. Hansen, his compliance with and NASA implementation of a variety of obligations of federal government employees to avoid, disclose or request waivers for certain activities. (NASA has not provided an identifying or tracking number for this Request). (Ex. 1)

37. The record request breaks down into three expressly delineated categories, including "Approvals and Waivers for Outside Employment" (Request §I), "Financial Disclosure/Conflict of Interest" (§II), and "Disciplinary" (§III), with the requested records specifically described in Plaintiff's Request.

38. Hansen is an astronomer at NASA's Goddard Institute for Space Studies, often described inaccurately in his advocacy as a 'climatologist', apparently because he speaks out in his official position on 'climate' and 'climate change' (climatology was until recently been a sub-discipline within a different scientific field, geology). He has served as Director of GISS since 1981, a visible platform from which Hansen has in recent years

has become the most prominent voice on 'climate'-related policy within the federal government including providing advice to the executive and legislative branches.

39. Hansen has since 2007 increased his outside employment and other activities as part of and otherwise relating to his work as a NASA employee, which activities include but are not limited to public policy and political activism as well as commercial activities. Since becoming in his description more "provocative" he has also become the recipient of large cash awards and otherwise of income for outside employment or activity relating to, and sometimes expressly for, his taxpayer-funded work.

40. This outside employment and other activity is often directly compensated for services, in the form of speaking fees or honoraria, or royalty- and otherwise-compensated writing. It has extended beyond speeches, to advising and serving as an expert witness in support of defendants tried for trespass and destruction of private property in the name of 'climate' civil disobedience, to promoting and participating in protests of coal plants and public policy, and advising litigants in actions against states and the federal government.

41. Hansen regularly asserts about such activities that he appears and speaks publicly in his personal capacity. Although Hansen does also claim that, e.g., his statements are made "on behalf of the planet, of life on Earth, including all species",¹ he is typically

¹ See e.g., Direct Testimony of James E. Hansen, Before the State of Iowa, Iowa Utilities Board :

By whom are you presently employed and in what capacity?

A. I am employed by the National Aeronautics and Space Administration (NASA) Goddard Space Flight Center (GSFC), which has its home base in Greenbelt, Maryland. I am the director of the Goddard Institute for Space Studies (GISS), which is a division of GSFC located in New York City. I am also a senior scientist in the Columbia University Earth Institute and an Adjunct Professor of Earth and Environmental Sciences at Columbia. I am responsible for defining the research direction of the Goddard Institute, obtaining research support for the Institute, carrying out original scientific research directed principally toward understanding global change, and providing relevant information to the public. I am testifying here as a private citizen, a resident of Kintnersville, Pennsylvania on behalf of the planet, of life on Earth, including all species. November 2007, http://www.columbia.edu/~jeh1/2007/IowaCoal_20071105.pdf, viewed May 12, 2011.

billed as Director of NASA's GISS. No astronomer not employed with this senior position at NASA has been so widely asked for media comment, to give well-compensated speeches, or awarded large cash prizes as Hansen has been.

42. Hansen's outside employers typically bill him in promotion solely as Director, NASA Goddard Institute for Space Studies, making plain the argument that the outside employment and other activity relates to his work. Such activities would properly be the subject of certain records Plaintiff seeks from NASA.

43. This clear, public record also affirms that Hansen is sought for such employment as a result of his position with the federal government. That position vastly expands Hansen's audiences, the attention given his outside activities, the awards, prizes and speaking honoraria bestowed upon him, and his opportunities not available to any other astronomer, climate activist or career government employee.

44. In 2006 Hansen gave what he described as "a potentially provocative interview" to the CBS television network's program "60 Minutes", for a package focusing on Hansen titled "Rewriting the Science: Scientist Says Politicians Edit Global Warming Research". This program aired on March 19, 2006 and again on June 30, 2006, keying off of the White House's response to Hansen's practice of giving media interviews on government

Petitioners do note that Hansen's SF 278 financial disclosure forms list no such affiliations in Schedule D, Part I: Positions Held Outside U.S. Government ("report any positions held during the applicable reporting period, whether compensated or not. Positions include.....representative, employee, or consultant of...any non-profit organization or educational institution"), for the years 2004 - 2007, inclusive. Per these attested filings, Hansen's Columbia work began on 1/01/08, though this is reported somewhat confusingly. On his SF 278 form for 2008, which forms are generally turned in on May 15 of each year, Hansen lists "Adjunct professor, Columbia University 1/01/08 - 5/15/09", the latter being the date he completed the form. It does not say "to present", as is suggested one do if that's the case, leaving the possibility that it was an error because in 2009's form, Hansen wrote in "none" under Schedule D, indicating no such outside work during 2009. Also, Hansen reports no income from Columbia University in any recent year (2004 - 2009 inclusive; ATI's request for Hansen's 2010 SF 278 is pending).

policy as a NASA employee, as opposed to on science. That was to require that media requests to interview Hansen be approved before he accept them.

45. Beginning later that year, Dr. Hansen became the subject of public reports regarding outside income.

46. In September 2006, *Investors Business Daily* ran an editorial board item titled "The Soros Threat to Democracy", in which it alleged that philanthropist George Soros's Open Society Institute "gave [Hansen] 'legal and media advice'", and that "Hansen was packaged for the media by Soros' flagship 'philanthropy,' by as much as \$720,000, most likely under the OSI's 'politicization of science' program'."

47. On September 27, 2007, Hansen responded to both points on his personal webpage with "...And Other Forms of Lawlessness". *See* http://www.columbia.edu/~jeh1/mailings/2007/20070927_Lawlessness.pdf. Regarding the claim that he accepted outside income he wrote, *inter alia*, that he had never received direct financial support from Soros although he may have received such support indirectly, through taking support from groups receiving money from Soros, like the Government Accountability Project (GAP).

48. For example, the "Soros foundations' network", through its vehicle the Open Society Institute (OSI), has written "The Government Accountability Project, a whistleblower protection organization and OSI grantee, came to Hansen's defense by providing legal and media advice. "BUILDING OPEN SOCIETIES: SOROS FOUNDATIONS NETWORK, 2006 REPORT, at http://www.soros.org/resources/articles_publications/publications/annual_20070731/a_complete.pdf, p. 123, viewed June 16, 2011.

49. Hansen wrote that following the "60 Minutes" interview he was offered "the Ridenaur Award (including a moderate amount of cash-- \$10,000)" by GAP, which he turned down because of the nominating process (without elaborating), and because it would be improper to accept awards creating the appearance of being financially rewarded for his outspokenness ("I was concerned that it may create the appearance that I had spoken out about government censorship for the sake of the \$").

50. Hansen wrote in the same piece that in early 2006 he began and "continued to accept pro bono legal advice for a while" from the same group. The Government Accountability Project states its "mission is to promote corporate and government accountability by protecting whistleblowers, advancing occupational free speech, and empowering citizen activists." Free legal services are not reflected in Hansen's public financial disclosure Form SF 278 for 2006 or 2007, for example under Schedule B Part II: Gifts, Reimbursements and Travel Expenses.

51. The public record and Hansen's Form SF 278 public financial disclosure filings for 2004 and 2005, which NASA has released to Plaintiff, report no financial awards, prizes, honoraria or outside income. Then, following the "60 Minutes" interview, the public record indicates that Hansen began receiving such outside income and in often large amounts, totaling more than one million dollars between 2007 and 2010, inclusive.

52. These were often characterized by the provider as being for his work as a taxpayer-funded employee, but regardless generally with no reason for the sums cited which was not related to his taxpayer-funded employment.

53. These prizes include a 2007 prize from the Dan David Foundation. The Foundation's website states, *inter alia*:

The Dan David Prize recognizes and encourages innovative and interdisciplinary research that cuts across traditional boundaries and paradigms.

... Three prizes of one million US dollars each are granted annually in the fields chosen for the three time dimensions. The prizes are granted to individuals or institutions with proven, exceptional, distinct excellence in the sciences, arts, and humanities that have made an outstanding contribution to humanity."

54. The foundation's page detailing Hansen's selection (*see* <http://www.dandavidprize.org/laureates/laureates-2007/60-2007-future-quest-for-energy/79-james-hansen.html>, *viewed* May 11, 2011) describes him as "affiliated with the NASA Goddard Institute for Space Studies in New York." It cites no other affiliation for Hansen.

55. Also according to the Foundation's website, "The individual or institution being nominated has made a unique, profound contribution to humanity, on a global scale, in one of the selected fields for the year in which the nomination is being made."

56. Hansen shared this prize for unique, profound contribution to humanity on a global scale in the field of "the Quest for Energy", with two researchers into solar cell technology. An astronomer, Hansen does not research the quest for energy.

57. Elsewhere on its announcement the Foundation acknowledges more specifically that the award was given for "his specific seminal contributions to climate research". The sole cited research is a set of three projected greenhouse gas emission-temperature scenarios of the future, which Hansen created and presented in famous testimony to Congress nineteen years prior, often credited with initiating the modern political 'global warming' movement.

58. The described scenarios/climate research was created by Hansen in his employment with the federal government. Hansen also gave the cited congressional testimony in his official capacity with NASA.

59. The award announcement offered an alternate consideration underlying this large cash award to Hansen, "In addition, Dr. Hansen has considered the possibilities of control on different greenhouse gases and aerosols and offered suggestions of the most likely areas for special efforts in suppressing the accumulating greenhouse contributors."

60. Unlike the cited 1988 temperature projections and testimony this rationale would arguably represent some activity not reasonably considered to be part of Hansen's NASA duties, if still clearly "related to" these duties. However, Hansen has long argued in defending his media presence on behalf of NASA as being an appropriate part of his federal job. (See, e.g., "Climate Expert Says NASA Tried to Silence Him", *New York Times*, January 29, 2006, at <http://www.nytimes.com/2006/01/29/science/earth/29climate.html>, viewed June 2, 2011). Also, Hansen's performance plans (NASA Form 1701) over relevant periods included under "Critical Elements" of his position a new emphasis, beginning with FY 2006, of "communicate effectively with the public".

61. Subsequent awards that the public record indicates Hansen has accepted for or relating to his work for the government, and which would reasonably be addressed in certain records Plaintiff seeks if these records exist, include but are not limited to the 2010 Blue Planet Prize with a monetary equivalent of over \$550,000, and \$100,000 for the 2010 Sophie Prize for having "combine[d] his research with political activism" (see http://www.sofieprisen.no/Prize_Winners/2010/index.html, viewed May 12, 2011).

62. Hansen's public financial disclosures also reveal another revenue stream beginning after that "60 Minutes" interview, for or relating to his work as a federal employee, of often substantial speaking honoraria on the subject of his work for NASA. For example his 2007 Form SF 278 form provided to ATI by NASA asserts two paid

speeches relating to his work each for "in excess of \$5,000". (Ex. 2) Hansen's 2008 Form SF 278 reports three honoraria totaling \$14,000.00 for speeches relating to his work as a federal government employee, as well as \$126,882 in awards. (Ex. 3)

63. Hansen's Form SF 278 for 2009 reports that he also received at least \$24,164 in outside income for two speeches on the subject on which he works as a federal government employee, to Shell Oil (\$14,164.00) and to the Progressive Forum (\$10,000.00). (Ex. 4) The former outside employer lobbies in favor of federal laws and policies premised in man-made global warming, part of a practice known as "rent-seeking" (see, e.g. <http://www.pewclimate.org/uscap.cfm>, "ConocoPhillips, BP and Caterpillar quit USCAP", *Washington Post*, February 17, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/16/AR2010021605543.html>); the latter states its "purpose is to enrich our democracy and culture by presenting the great minds who we believe are advancing the success of the individual, our species, and life on the planet, great minds from all the fields of human endeavor, the sciences and humanities as well as politics and public affairs."

64. On May 16, 2011 ATI requested Hansen's 2010 Form 278 under FOIA, NASA Request # 11-GSFC-F-00881. This request is still pending, awaiting NASA to produce this record which by practice is filed on or before May 15 each year. NASA states that Hansen has asked for and been granted an extension of 30 days to file this form.

65. Other emails obtained under FOIA by the Competitive Enterprise Institute (CEI) acknowledged Hansen receiving gifts for or related to his work for the federal government. For example, in one email Hansen tells a non-NASA colleague that the William J. Clinton Foundation waived Hansen's \$15,000 participation fee for

participating in an event in return for him speaking on the topic of his work as a government employee.

66. Other emails obtained under FOIA by CEI include a September 2007 email from a Hansen subordinate written on his NASA email account during normal business hours and addressing his own availability to perform a certain task for his job, declining with the comment that "Id' better finish the graph for Jim's book anyway". Hansen published a commercial book in 2009 "Storms of My Grandchildren: The Truth About the Coming Climate Catastrophe and Our Last Chance to Save Humanity".

67. Although Hansen did publish this commercial book, on the subject of his work for the federal government, no revenue for an advance on royalties or for royalties from the book, from its publisher or an agent or otherwise styled as deriving from this book's publication appear on Hansen's SF 278 forms for years 2007, 2008 or 2009.

68. All such revenue generating activities described, *supra*, would properly be subjects of Form 17-60 requests for permission for outside employment or activity. Plaintiff seeks to determine whether such requests were made and whether, over these years, NASA has required they be properly submitted for Hansen's many and much-publicized outside employment and other activity relating to his employment with the government.

69. Other emails released publicly under a FOIA request by CEI also indicate that, possibly due to Hansen's demonstrated ability to obtain widespread and favorable media coverage for himself and unfavorable coverage of his superiors, his office operates under different levels of management oversight than are required of government employees.

70. For example, CEI learned under FOIA that Hansen's GISS employee, Dr. Gavin Schmidt, had not filed the required Form 17-60 to obtain permission to engage in outside employment or activity, for his writing for and editing a third-party website called www.RealClimate.org. "RealClimate" is active in the political and policy debate, promoting a particular position about man-made global warming similar to that which GISS regularly promotes through press releases and Hansen's "communication with the public" in his professional and 'outside employment' activities.

71. The time-stamps associated with Schmidt's writing on RealClimate were removed from that website after CEI notified NASA that these revealed Schmidt regularly performed this outside employment during regular work hours. CEI states in court filings that it retained captures of the original time-stamped work. (See, "Schmidt works extensively on Real Climate during NASA work hours. He uses his NASA e-mail address and/or NASA servers and computer equipment when posting to the Real Climate website. Until relatively recently, posts on Real Climate.org were accompanied by timestamps, which clearly indicated that Dr. Schmidt had been posting to Real Climate during the business day. After Plaintiff filed its FOIA request seeking Schmidt's Real Climate e-mails, someone retroactively deleted all timestamps from Real Climate posts. Timestamps also were deleted from all archived posts. Plaintiff has retained high-resolution color copies of the Real Climate site that still reflect the original timestamps", Complaint, *CEI v. NASA* (DC D.C. C.A. No. 10-0883), paras. 28-29).

72. Other emails released under FOIA to CEI revealed that Schmidt performed this work with the knowledge and encouragement of his colleagues and superiors at NASA/GISS, who often made suggestions for, submitted, and were solicited for content.

Because this work relates to, and for the above-cited reason arguably is part of, Schmidt's employment with the federal government, he is required to file Form 17-60.

73. In this litigation seeking access to NASA's RealClimate records (principally, email communications), NASA revealed that Schmidt had not been filing his Form 17-60 for this work-related outside employment. NASA also has stated that Schmidt began doing so after CEI brought the public's and NASA's attention to the matter.

74. As Director of NASA's Goddard Institute ("Chief, Goddard Institute for Space Studies", in his SF 278 filings), Hansen holds and is to execute NASA's responsibility for compliance with applicable law and regulation.

75. In that same litigation NASA voluntarily released certain Form 17-60 filings (Ex. 5) for Schmidt.

76. In that litigation NASA has stated that RealClimate-related records in its possession are not agency records because the activities are not performed on taxpayer time. NASA claims instead that "Most personnel at GISS do not keep 'regular business hours' (i.e., 9:00 a.m. to 6:00 p.m. with an hour for lunch)... All GISS employees who are members of the civil service are permitted to work flexible schedules; moreover, GISS does not require its employees to formally set a specific alternative schedule in advance, so long as they work at least the minimum 40 hours per week", and that, as such, once Schmidt begins performing them, regardless of whether it is in his GISS office and during what other people may consider regular business hours, by virtue of performing such outside employment it is inherently not being performed on NASA time. (Second Declaration of Larry D. Travis in Support of Defendant's Motion for Summary Judgment,

para 7; this was provided to NASA by ATI as its Exhibit 3 in its administrative appeal of the instant matter (Ex. 7).

77. As such, it is implicit in NASA's asserted position that NASA does not view its own and government-wide rules and regulations addressing performance of non-work duties on government time and assets as *de jure* applying to GISS employees.

78. NASA GISS Form 17-60 requires an employee applying for permission for outside employment or activity to check 'YES' or 'NO' to the statement "OUTSIDE EMPLOYMENT OR OTHER ACTIVITY WILL BE PERFORMED BEYOND NORMAL DUTY HOURS" (CAPS emphases in original).

79. As the implication of NASA's stated policy is contrary to the letter and spirit of relevant law, regulation and even relevant NASA forms, this position and records relating to NASA's implementation of it are of the public interest. ATI's Request at issue in the instant matter seeks to shed light on this policy, NASA's and Hansen's implementation of it, and their respective compliance with and oversight of the requirements involving Form 17-60, and proper use of agency time.

80. Upon learning of this implicit NASA policy, of Schmidt's failure to file the required application for waiver for outside employment, and therefore of NASA's and Hansen's respective failures to require compliance with this requirement, ATI filed its January 19, 2011 FOIA Request at issue in the present case. (Ex. 1)

81. This Request seeks records establishing whether NASA was or also was not fulfilling its statutory obligations to require Hansen to abide by certain requirements. The Request specifically described a variety of records sought, all relating to ethics and disclosure requirements and was specifically broken into three categories, "I. Approvals

and Waivers for Outside Employment", "II. Financial Disclosure/Conflict of Interest", and "III. Disciplinary".

82. This Request covered responsive records received or produced by relevant NASA office(s) and/or otherwise dated between January 1, 2004 and the date NASA complied with the specific record Request.

**Defendant's Response to FOIA Request §I Seeking Certain
Records Relating to Hansen Waivers for Outside Employment**

83. On February 15, 2011, NASA responded with a partial initial determination, placing ATI's Request and applicable deadlines in suspense awaiting completion of discussions over ATI narrowing certain requests, and NASA's final determination. (Ex. 6)

84. This partial initial determination, *inter alia*, denied in part ATI Request "I. Approvals and Waivers for Outside Employment".

85. The instant matter involves only NASA's denial of ATI Request §§I.1-2, seeking:

1. All *applications or requests for approval for outside employment* by James E. Hansen of the Goddard Institute for Space Studies (GISS) pursuant to 5 C.F.R. 6901, *and* any documents referenced in or provided with any such applications as attachments or otherwise;
2. All approvals or denials of such applications described in "1", *supra*, pursuant to 5 C.F.R. 6901.103(g), *and* any other communications made or other actions taken in response to those applications or requests for approval, and related correspondence, including any documents referenced therein, as attachments or otherwise;

which denial was grounded in that "FOIA Exemption (b)(6)...permits the Government to withhold all information about individuals in 'personnel and medical files' when the disclosure of such information 'would constitute a clearly unwarranted invasion of personal privacy' 5 U.S.C. §552(b)(6)."

Plaintiff's Internal Agency Appeal of NASA's Partial Initial Determination

86. By letter dated March 15, 2011, Plaintiff appealed NASA's various initial determinations denying specific document requests under §I.1-2 and §III of Plaintiff's FOIA Request, to the NASA Administrator. (Ex. 7) The Internal Appeal was 23 pages and contained 6 exhibits, including NASA emails and evidence in the public record demonstrating at least certain activities for which a Form 17-60 should be on file for James Hansen's outside employment and income, also that NASA had previously released Form 17-60 for Schmidt, that NASA employees spent official time working on Hansen's book, that Hansen had given at least one paid speech on the subject of his work for the government, and that Hansen had accepted at least one five-figure gift.

NASA's Final Determination

87. By a three-page letter dated May 2, 2011, two weeks after its response was due, NASA affirmed its initial determination and denying ATI's administrative appeals seeking records in its Request §§I.1-2. (Ex. 8)

88. Regarding the Forms 17-60 and attachments, NASA asserted that "disclosure would 'constitute a clearly unwarranted violation of personal privacy'" (citing FOIA Exemption (b)(6), 5 U.S.C. § 55(b)(6)). NASA's reasoning was that "These documents include information on Dr. Hansen's personal speaking interests and activities, organizations and entities for which Dr. Hansen was planning speaking engagements to express his personal views, and the financial terms of his appearances."

89. The latter also describes information about Hansen specifically cited in his Forms SF 278 that are made public by statute and which NASA has thereby released.

90. NASA did not agree to ATI's request that any records which may be redacted be redacted and provided in that form, nor did it suggest redacting any particular information, but refused to release any of these records in any form.

91. If these records exist they represent *prima facie* evidence whether James Hansen and NASA are complying with certain of their disclosure obligations applicable to Hansen's many, well-publicized and lucrative outside employment and other activities unique among federal employees under the Ethics in Government Act of 1978, 5 U.S.C. App §101, 5 C.F.R. § 26355, and C.F.R. § 6901.103, Supplemental Standards of Ethical Conduct for Employees of the National Aeronautics and Space Administration.

92. If it is established that these records do not exist, this represents *prima facie* evidence whether James Hansen and NASA are complying with certain of their disclosure obligations.

93. In support of its denial of ATI's request for these records NASA argued that ATI "had not made the requisite showing that the documents requested would 'contribute to the public's understanding of the activities of the Government, or how it would shed light on NASA's performance of its statutory duties, such that the public's interest in disclosure outweighs Dr. Hansen's privacy interest'".

94. In Plaintiff's original request and its administrative appeal to which NASA refers, it sought records which inherently address and pertain to NASA's implementation of and compliance with ethics laws and regulations, and therefore implicate the black-letter FOIA principle that agency compliance with its statutory obligations is in the public's interest and precisely the sort of information for which FOIA was enacted. *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773, 775 (1989).

95. Plaintiff's appeal dedicated four pages plus one paragraph to the requested documents' inherent contribution to the public's understanding of the activities of the government and how they shed light on NASA's performance of its statutory duties. This came in reply to NASA's initial determination articulating Dr. Hansen's privacy interest in one paragraph, which paragraph also accurately described certain information released in Hansen's far more detailed, far more revealing Form SF 278 regularly released to the public, affirming that such information is not inherently exempt.

96. NASA further supported this denial by arguing, "ATI asserts that its interest is to expose wrongdoing in conjunction with agency programs", styling ATI's FOIA Request therefore as an "'agency wrongdoer' claim". NASA cited neither ATI's Request nor its Appeal in support of this claim. This recast ATI's stated purpose and the public interest involved, e.g., as set forth by ATI in its administrative appeal at pp. 4-5, that:

whether NASA holds its employees to compliance with ethics laws is of high public interest. Similarly, revealing whether NASA so required its employees to comply with ethics laws sheds light on NASA's performance of its operations and performance of statutory duties... The requested records relate to the operation of government and NASA's compliance with ethics laws ... As NASA described the activities addressed on the disclosure filed pursuant to 5 C.F.R. § 6901.103, recorded in NASA form GSFC 17-60, when releasing Schmidt's relevant records: "Notably, the GSFC 17-60 forms reflect[a] request for 'outside employment permission' to participate in an activity in which he was to receive some remuneration or which carried a risk of appearance of a conflict of interest." This process is executed for a simple reason. As NASA itself characterizes this reason, again in releasing Schmidt's records, "the Agency [has] regulatory requirements governing authorization of outside employment activities for NASA employees." (footnoted citations omitted)

97. ATI also provided NASA copies of NASA employee emails including in which Hansen asserts a gift received, and one in which his colleague states he was working on Hansen's book during the business day. In its final determination NASA characterized these employee emails as "mere allegations" which "are insufficient to satisfy the public

interest standard required under FOIA" for "agency wrongdoer claims". NASA compared those exhibits, and citations of the public record of Hansen's outside employment, to "unsupported claims" of Medicare fraud. NASA also stated "Nowhere in either ATI's original request or appeal does ATI cite evidence sufficient to support a conclusion of Government impropriety."

98. NASA recasts what is apparently Hansen's commercial book cited in a September 2007 email attached to Plaintiff's appeal, "Storms of My Grandchildren", in which email Hansen's colleague Makiko Sato demurs to performing certain NASA-related work on the grounds he has to "finish the graph for Jim's book". NASA restyles this as Sato "relat[ing] he is working on a graph for a publication Dr. Hansen is working on" and that "the production of scientific publications is a basic function of GISS". "Storms" was not a NASA publication, but a copyrighted work of James Hansen published by commercial publisher Bloomsbury USA.

99. To support the notion that this book was a NASA scientific publication, NASA states, "Dr. Sato has been co-author with Dr. Hansen on several works produced in their official capacity, which are listed in Dr. Hansen's public bibliography of NASA publications on the Internet at <http://pubs.giss.nasa.gov/authors/jhansen.htm>".

100. This bibliography (*viewed* May 12, 2011) cites largely academic or scientific pieces in the refereed journals, with a very few exceptions of popular magazine articles, but no "books" and not "Jim's book" of the relevant period, a commercial project written neither as a basic function of GISS nor apparently in either Hansen's or Sato's official capacity.

101. Plaintiff notes that this official bibliography of publications produced, according NASA, in Hansen's official capacity, does include an "invited article" for which Hansen was paid "in excess of \$5,000" (per Hansen's SF 278 form for 2006), Hansen, J., 2006: The threat to the planet. *New York Rev. Books*, 53, no. 12 (July 13, 2006), 12-16.

Therefore, by apparently arguing that Hansen was paid "in excess of \$5,000" for a paper he wrote in his official capacity and for which he was paid by the taxpayer, and given the prohibition on using public office for private gain, NASA further implicates the public's interest in learning whether NASA condones such outside employment, and about the process by which Hansen's outside activities were or were not approved.

102. Responding to Plaintiff's evidence that NASA has already released Forms 17-60 for Hansen's colleague Schmidt, NASA stated that "release of these documents did not take place under NASA's administrative FOIA process but in conjunction with a summary judgment motion filed by the United States in the case of Competitive Enterprise Institute v. NASA. 1:10-CV-00883, in the United States District Court for the District of Columbia." NASA states that instead, "this disclosure was made pursuant to the Privacy Act, 5 U.S.C. § 552a, for purposes consistent with NASA Privacy Act System of Record 10SPER."

103. Although NASA cites no exception to the Privacy Act applicable to, authorizing or "consistent with" NASA's release of Schmidt's form 17-60, Plaintiffs do note that NASA has adopted Revisions of NASA Appendices to Privacy Act System of Records, amending its own standard practices (October 1, 2007, 72 FR 55811-55812; available at http://www.nasa.gov/privacy/nasa_sorn_appendix.html), asserting that release of information covered by the Privacy Act in litigation is a "routine use" of the information

(Standard Routine Use 5, Routine Use for Agency Disclosure in litigation states, in pertinent part, "It shall be a routine use of the records in this system of records to disclose them in a proceeding before a court or adjudicative body before which the agency is authorized to appear, when...the use of such records by the Agency is deemed to be relevant and necessary to the litigation, provided, however, that in each case, the Agency has determined that the disclosure is compatible with the purpose for which the records were collected.").

104. NASA's practice in the CEI case seeking NASA's Schmidt/RealClimate records affirms that release in FOIA or other litigation to which it is relevant is compatible with the purpose of collecting it, which is to ensure and shed light upon compliance with ethics laws and regulation.

105. There is therefore no material distinction between Schmidt's Forms 17-60 and the instant matter.

106. Schmidt's NASA position, unlike Hansen's, does not require he file Forms SF 278 which are made publicly available as a condition of his employment. As Hansen does file the Form SF 278, any possible personal financial information contained in Hansen's Form 17-60 has by law and regulation already been provided in the releasable Form SF 278, thereby further mooted NASA's claim that to release Hansen's Form 17-60 would impermissibly release private financial information.

FIRST CLAIM FOR RELIEF

Duty to Release Records Relating to Applications and Waivers for Outside Employment -- Declaratory Judgment

107. Plaintiff re-alleges paragraphs 1-106 as if fully set out herein.

108. FOIA requires all doubts to be resolved in favor of disclosure. Federal statutes and NASA regulations require the agency to “provide for the widest practicable and appropriate dissemination of information concerning its activities and the results thereof.” 42 U.S.C. § 2473; 14 C.F.R. § 1206.102. The President has directed executive agencies to comply with FOIA to the fullest extent of the law. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009).

109. Plaintiff has sought and been denied production of responsive records concerning Hansen's outside employment as identified in its Request §§I.1-2.

110. NASA has voluntarily produced the same information for an employee of Hansen in a FOIA proceeding, and has cited no specific provision of law to distinguish its release of that information.

111. Plaintiff has a statutory right to the information it seeks.

112. Plaintiff has exhausted its administrative remedies.

113. This Court should enter a judgment declaring that

- i. NASA GISS's Form 17-60, and otherwise applications seeking and waivers granting permission for outside employment or activity and all attachments thereto ("the form"), and written discussions thereof, is not *prima facie* protected personal information;
- ii. Release of the form and written discussion thereof would not constitute a clearly unwarranted violation of an employee's personal privacy, although it may be redacted as appropriate if redactions are specifically justified;

- iii. NASA's denial of Plaintiff's FOIA Request seeking the described ethics-related records for James E. Hansen is not reasonable, and is inadequate under FOIA; and
- iv. NASA's refusal to produce Hansen's forms 17-60 is unlawful.

SECOND CLAIM FOR RELIEF

Release of Records Relating to Ethics in Government Act and to Applications and Waivers for Outside Employment -- Injunctive Relief

- 114. Plaintiff re-alleges paragraphs 1-113 as if fully set out herein.
- 115. Plaintiff is entitled to injunctive relief compelling Defendant to produce all records in its possession responsive to Plaintiff's Request §§I.1-2.
- 116. This Court should enter an injunction ordering the Defendants to produce to Plaintiffs within 10 business days of the date of the order:
 - i. The described ethics-related records for James E. Hansen, including his Forms 17-60 and related written discussion thereof, or a detailed Vaughn index claiming FOIA exemptions applicable to withheld information; and
 - ii. All approvals or denials of such applications and any other communications made or other actions taken in response to those applications or requests for approval, related correspondence, documents referenced therein and attachments.

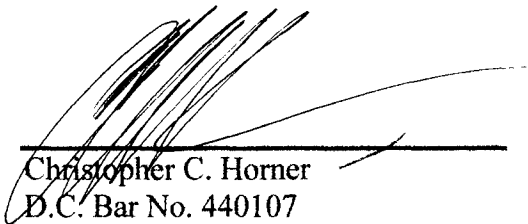
THIRD CLAIM FOR RELIEF
Costs And Fees – Injunctive Relief

- 117. Plaintiff re-alleges paragraphs 1-116 as if fully set out herein.
- 118. Pursuant to 5 U.S.C. § 552(a)(4)(E), the court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

119. This Court should enter an injunction ordering the Defendants to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

WHEREFORE, Plaintiffs request the declaratory and injunctive relief herein sought, and an award for their attorney fees and costs and such other and further relief as the Court shall deem proper.

Respectfully submitted this 21st day of June, 2011,



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